PUBLIC PROSECUTOR

v.

GOH KIM LOOI

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CIVIL SUIT NO. 47-4-90]
29 JANUARY 1994

DANGEROUS DRUGS: Trafficking in dangerous drugs - Drugs discovered in motorcycle used by accused - Large amounts of drugs further discovered in a locked room in house tenanted by accused and relatives - Whether accused had exclusive possession, custody and control of drugs - Whether accused has rebutted on a balance of probabilities presumption under s. 37(da) of the Dangerous Drugs Act.

EVIDENCE: The duty of the Court to evaluate the prosecutions case before calling for the defence in the light of the decision in Khoo Hi Chiang v. PP - Essential ingredients for a prima facie case - Whether accused may now be convicted if he chooses to remain silent when defence is called.

CRIMINAL PROCEDURE: Admissibility of cautioned statement by accused - Elements of voluntariness - Missing incriminating items of evidence - Whether vitiates prosecutions' case - Impeachment of witness - Leave to examine as hostile witness.

The accused faced 4 charges of trafficking in a variety of dangerous drugs including heroin and candu. She had been under observation by police and had been stopped whilst riding a motorcycle (P14) on the way to Georgetown, Penang. Upon a search being conducted, four packets of drugs were found, wrapped and covered in various types of material.

Police personnel involved in the operations later testified that the accused, a woman aged 55 years took out from her right blouse pocket a bunch of 8 keys. Police led her back to her residence and one of the keys opened the door to an upstairs room (room No. 3) which had two entrance points, both being locked from the inside. A heap of things, later discovered to be drugs, were found covered by a blanket on the floor. Some other occupants of the house (the accused's relatives) were later also detained by police.

During the hearing several issues arose for consideration before the learned JC. A cautioned statement allegedly made by the accused was objected to by the defence on several grounds, all relating to the essential ingredient of voluntariness. The defence submitted that the accused, an elderly woman, had been intimidated during questioning by the interrogating officer, a burly man who apparently thumped the table hard when answers were not forthcoming. The accused also complained that proper nourishment was not supplied.

Another critical issue before the Court was the effect of the Supreme Court's decision in *Khoo Hi Chiang v. PP* [1994] 1 AMR on the evaluation of prosecution evidence before deciding whether the adjudicating Court should call upon the accused to enter his defence.

The learned JC also considered the impact of missing incriminating evidence upon the prosecutions' case.

Held:

[1] The cautioned statement by the accused:

There are several essential points to consider in deciding the issue of admissibility of a cautioned statement under s. 37A(1). The all important element is the element of voluntariness in the making of the cautioned statement. The prosecution bears the *onus* of proving beyond any reasonable doubt that the confession was "of one's own free will." This expression would require that the prosecution show that the maker of the statement was completely free from any form of restraint when giving the statement and this includes psychological restraint or psychological oppression. The state of mind of the accused is the focus here and therefore the question whether the statement was voluntary is a subjective one. The Courts take this approach because they bear in mind that it would run counter to the very grain of normal human conduct for a person who would most probably be aware that a death sentence awaits him to nevertheless with true voluntariness confess away his life.

The point raised by the defence was concerning oppressive circumstances being present during the period of questioning and the 'making' of the statement. Considering the condition the accused was then in and the peculiar circumstances of her interview, applying the subjective test, there was psychological oppression on the accused and the statement is therefore inadmissible.

[2] 'Evaluation' of prosecution case or *prima facie* case:

The sole thrust of the *Khoo Hi Chiang* decision is that the Courts are enjoined to take a greater evaluation of the prosecution case than before, in a qualitative rather than quantitative sense in terms of evidence led. *Haw Tua Tau* took the 'minimal' approach in the evaluation of prosecution evidence in that it postulated a defferment or cursory and uncritical evaluation of the prosecution evidence until the defence evidence had been heard. A further evaluation of the probative value and strength of the prosecution case would be necessary before deciding whether to convict in the event the defence remains silent and calls no witnesses. However the position now appears to call for consideration of the question, whether in the event the defence remains silent ("unrebutted" as under s. 180 CPC) the strength and probative value of the prosecution case is such that the charge would be proved beyond reasonable doubt. This would justify automatic conviction of the accused should the accused remain silent. The Court once it calls for the defence to be entered must now necessarily convict the accused should the accused choose to remain silent and call no evidence.

The words ritually administered to the accused after having called him/her to enter upon his/her defence appear now to require the additional "but should you do so [remain silent] this Court would have no alternative but to find you guilty as charged."

It would also appear that in the interest of justice the Court ought to go beyond satisfying itself a *prima facie* case is made out and actually state its reasons and rationale for holding the prosecution has established its case beyond reasonable doubt which if unrebutted, would warrant a conviction. The adjudicator would have to demonstrate a conscious intellectual activity in his judgment on the critical evaluation of the case.

In the present case, in deciding whether there is a sufficient *prima facie* case, the evidence of the son of the accused (PW10), also said to involve himself in drugs, must be evaluated. PW10's evidence in Court was hesitant and evasive. He was not firm in his testimony as to which room or rooms his mother occupied. The inconsistent nature of his evidence renders PW10 devoid of any credibility as a witness in this trial.

The prosecution's main witnesses however had not been broken in cross-examination, the pointed evidence which told against the accused. The Court is satisfied that the keys from the accused's pocket opened the door to room No. 3 which contained a heap of drugs. Bearing in mind the chain of evidence was not broken and that the accused was stopped while riding a motorcycle wherein drugs were being carried, the accused would appear to have exclusive control, care and custody of the drugs, including the ones in room No. 3. The presumption under s. 37(da) operated and the accused was called to enter upon her defence.

In considering the accused's evidence, the Court had to also consider whether certain incriminating items which were vital but missing due to the criminal actions of a policeman were fatal to the prosecution case.

The missing items in the present case do not necessarily vitiate the prosecution's case as the Court is satisfied that the items, some cash, gold items and the keys did exist at the material time. As the Court is satisfied beyond doubt that the accused was the sole and exclusive occupant of the room No 3 and the key was recovered from the accused's blouse, the Court finds beyond reasonable doubt that the accused had exclusive custody, control and knowledge of all the offending drugs.

[3] Impeachment of Prosecution Witness

An application was made to impeach the evidence of PW10 (accused's son) on grounds his evidence in Court contradicted his statement under s. 112 CPC.

The application was refused as the contradiction centred on the Malay usage of the word "sebelah" when PW10 explained his mother stayed in the room "sebelah". The other inconsistencies too did not strike at the root of the issue. However leave to cross-examine PW10 as a hostile witness was allowed after an observation of the demeanour of the witness.

[4] In conclusion, the prosecution had built up a formidable case of exclusive possession, custody, control and knowledge of the offending items against the accused. The defence was a sham. The defence has thus failed to raise a reasonable doubt that the accused had exclusive possession custody and control and knowledge of the drugs. The presumption under s. 37(da) has not been rebutted.

[Accused found guilty and sentenced to death]

Cases referred to:
PP v. Aris bin Yunus [1989] 1 CLJ 239 ***(refd)***
PP v. Mohd Fuzi bin Wan Teh & Anor [1989] 2 CLJ 652 ***(refd)***
PP v. Lim Ah Hai [1992] 3 CLJ 1733 ***(refd)***
Ibrahim v. The Emperor [1914] 599 AC ***(refd)***
Wong Kam Ming v. The Queen [1980] AC 247 ***(refd)***
PP v. Chong Boo See [1988] 1 CLJ 679 ***(refd)***
PP v. Wong Kam Tong & Yang Lain [1991] 2 MLJ 931 ***(refd)***
PP v. Chuah Chee Phe & Satu Yang Lain [1991] 2 CLJ 924 ***(refd)***
Hasibullah bin Mohd Ghazali v. PP [1993] 2 AMR 43 ***(foll)***
Mohd Yusof bin Haji Ahmad v. PP [1983] 2 MLJ 169 F ***(refd)***
Dato' Mokthar bin Hashim v. PP [1983] 2 MLJ 232 ***(foll)***
R v. Pristley [1965] 51 Cr App Rep 1 ***(foll)***
R v. Prager [1972] 1 WLR 260 ***(cit)***
R v. Fulling [1987] 2 All ER 65 ***(refd)***
Khoo Hi Chiang v. PP ***(foll)***
Haw Tua Tau [1981] 2 MLJ 49 ***(not foll)***
Soo Sing & 2 Ors. v. PP [1951] 17 MLJ 143 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Pavone v. PP [1984] 1 MLJ 77 ***(not foll)***
Kumaraguru a/l N. Muniandy & 2 Ors. v. PP [1993] 2 AMR 50 ***(not foll)***
Lee Eng Kooi v. PP [1993] 2 CLJ 534 ***(refd)***
Chong Ah Chai & Ors. v. PP [1979] 2 MLJ 262 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180, 257(i), (ii)
Evidence Act, ss. 32(1), 145, 154
Dangerous Drugs Act 1952, ss. 37A(1), (da), 39B(1)(a), (2)
Dangerous Drugs (Special Preventive Measures) Act, s. 6(1)

For the prosecution - Ishak bin Mohd Yusoff, DPP
For the accused - Ameir bin Hassan; M/s. Ameir Hassan & Partners

JUDGMENT

Vincent Ng Kim Khoay JC:
The accused, a woman aged 55 years, was prosecuted on the following four amended charges (amended charges):

1st Charge

Bahawa kamu pada 28 Ogos 1989 jam lebih kurang 8.20 malam di Jalan Sungai Nibong Kecil, Sungai Ara, Bayan Lepas, dalam Daerah Balik Pulau, dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya iaitu 89.3 gram heroin, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

2nd Charge

Bahawa kamu pada 28 Ogos 1989 pada jam lebih kurang 8.30 malam di sebuah bilik di rumah No. 12, Jalan Sungai Ara, Taman Sungai Ara, Bayan Lepas, dalam Daerah Balik Pulau, dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya iaitu 4683.3 gram heroin dan dengan itu kamu telah melakukan suatu kesalahan dl bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

3rd Charge

Bahawa kamu pada 28 0gos 1989 pada jam lebih kurang 8.30 malam di sebuah bilik di rumah No. 12, Jalan Sungai Ara, Taman Sungal Ara, Bayan Lepas, dalam Daerah Balik Pulau, dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya iaitu 262.5 monoacetylmorphlne dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum di bawah s. 39B (2) Akta yang sama.

4th Charge

Bahawa kamu pada 28 0gos 1989 pada jam lebih kurang 8.30 malam di sebuah bilik di rumah No. 12, Jalan Sungai Ara, Taman Sungai Ara, Bayan Lepas, dalam Daerah Balik Pulau, dalam Negerl Pulau Pinang, telah mengedar dadah merbahaya iaitu 1000.7 gram candu dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

Evidence was led by the Prosecution from three principal witnesses, namely Insp. Guan Beng Kang (PW2), the operations leader Sulaiman bin Yusof (PW8) and Insp. Adzmi bin Haji Abdul Hamid (PW12) the investigating officer.

PW2, who was at the time of the drug operations, attached to Cawangan Anti-Dadah, Bukit Aman, Kuala Lumpur, testified that on 28 August 1989 at about 6 p.m. while in Tanjung Bunga, Penang, he together with eight other police officers and personnel including PW8 received instructions from PPP Prepal Singh to carry out observation in an area in Sg. Ara, Bayan Lepas from 7.00 p.m. on the same day until recalled, and to stop and arrest any person riding motorcycle No. PBN 237 (exhibit P14) if same is observed. The nine police personnel then proceeded from Tanjong Bunga with L/Kpl. Lian Kia Hock (Lian - PW9) at the wheel,

PW2, D/Sgt. Lim Seng Khong (Lim) and D/Kpl Osman bin Ayob (Osman) in a police car while the rest of them on motorcycles, each carrying a walkie talkie, and they arrived at Sg. Ara at about 7.00 p.m. The personnel on motorcycles were stationed at the area of pekan kecil Sg. Ara whilst the personnel in the car at Sg. Ara mosque area.

At about 8.15 p.m. PW2 received a message from D/Cpl. Abdullah bin Rahman (Abdullah Rahman), through the walkie-talkie that the said motorcycle (P14) had been sighted ridden by a female person and proceeding towards Georgetown. All the personnel in the car and motorcycles then closed-in on the said motorcycle, forced it to stop and PW2 informed the rider of same (identified as the accused) that he wanted to conduct a search. Upon a search on P14, PW2 found in its front basket a plastic bag with a 'KFC' logo (P6) which contained two large plastic packets (P7D and P8D), each attached to another small plastic packet (P7C and P8C), and all the four packets were wrapped in Chinese newspapers. P6 was wrapped in batek cloth (P15), which was in turn covered with two raincoats - one yellow and the other blue in colour (P16A and B). PW2 then examined the contents of P7C and D and P8C and D and found them to contain pinkish granules which he suspected to be drugs. Thereafter, he informed the accused that she was under arrest for possession of drugs. At all material times, visibility was clear as this operation was illuminated with the headlights of the car and two motorcycles of the police personnel. Then, upon his instructions the accused took out, from her left blouse pocket, a wallet which contained her Malaysian identity card, her driving licence and RM 812, and from her right pocket, a bunch of eight (8) keys. He then instructed Lim Seng Khong to handcuff the accused, and D/Cpl. Osman bin Ayob to ride the accused's motorcycle and follow him and the other police personnel to the accused's house. The accused was then put into his car, driven by DPC Lian Kia Hock. While therein she was asked by PW2 to show them the way to her house. They were led to a double storey terraced house bearing address No.12, Jalan Sungai Ara Dua, Sungai Dua, Penang (the said house). While Lian guarded the exhibits seized from the basket of P14, he together with other police personnel were let into the said house by a seven year old girl named Ng Soo Eng. Therein he saw two Chinese women named Cheah Phaik Khim and Ng Ah Nya seated at the majong table. He, together with PW8, Lim and Abdullah Rahman, in the presence of the accused carried out "flushing" search downstairs and found no other persons. They then went upstairs.

Looking at a room layout plan of the said house (exhibit P18A for top floor and P18B for ground floor), he said that room No. 1 in P18A was the master bedroom. Therein they found a woman named Yeoh Ah Sim with a baby, but there was no one in room No. 2, which shared a common bathroom with room No. 3 (as shown in P18A). The door to this common bathroom was locked from inside room No. 3. The room door to room No. 3 was also locked.

He then instructed Abdullah Rahman to guard the top floor and with Lim, PW8 and the accused he proceeded downstairs. There they were led by the accused to room No. 9 (as shown in P18B) which was not locked. From a drawer in a cupboard in this room they recovered a Malaysian passport, a citizenship certificate and a Maybank deposit book, all (three items) in the name of the accused, together with a sum of RM741.

They then searched upstairs and did not find any offensive items in rooms No. 1 and 2. PW2 then tried to open the lock to door of room No. 3 He succeeded in opening this door by using one of the keys from the bunch of 8 keys that the accused had earlier taken out from her right pocket and handed to him, when she was stopped and arrested at the said roadside.

As soon as he unlocked and opened the door to room No. 3 he saw a heap of things therein covered with a blanket on the floor near the common bathroom. At that moment, he observed that the accused appeared pale and sweating. He then uncovered the blanket and found three large bundles suspected to contain drugs, a large amount of paper currency, coins and other things. He then called the TKJSJ Haji Khalid bin Hashim on the walkie-talkie to arrange for assistance of an investigating officer and a woman constable.

At about 11.10 p.m., PW12 (the I.O.) arrived with his team and was immediately briefed by PW2, who then, in the presence of the accused, opened the packages and found the following:

(1) In the first bundle which was a brown paper bag P9(A) he found six plastic

packets each of which was in turn attached to a small plastic packet and a further 10 separate plastic packets, thus making a total of 16 large and 6 small plastic packets. All these 22 large and small plastic packets contained a pinkish coloured granular substance and each separately wrapped in Chinese newspaper. All the 22 plastic packets with contents was marked as exhibits P9(C), P9(E), P9(G), P9(I), P9(K), P9(M), P9(0), P9(Q), P9(S), P9(U), P9(W), P9(Y), P9(ZA), P9(ZC), P9(ZE), P9(ZG), P9(ZI), P9(ZK), P9(ZM), P9(ZO), P9(ZQ) and P9 (ZS).

(2) The next bundle examined was a shopping paper bag bearing words 'Emporium Seremban' (P11). P11 contained:

(i) 4 plastic packets of brownish coloured granular substance, each separately wrapped in Chinese newspaper (P11B(i) to P11B (iv));
(ii) 2 plastic packets of pinkish coloured granular substance (P11C(i) and P11D (i));
(iii) 17 small plastic packets containing a brownish granular substance (P11A(i) to (xvii)); and
(iv) 4 small plastic packets containing a brownish granular substance (P11E(i), D11F(i), P11G(i) and P11H(i)). All the items in (a) to (d) above were wrapped in Chinese newspaper.

(3) The last bundle was a white plastic shopping bag bearing alphabets 'O.G.'(P13). In P13 was found:

(i) 10 rectangular black plastic packages containing white powdery substance suspected to contain drugs (P13(A) to (J)) and,
(ii) one rectangular black plastic package suspected to contain candu (P13K).

After examining the 3 aforesaid bundles, PW2 laid out the contents on the floor for photographs to be taken, and then re-entered them into their respective original receptacles. PW2 also seized from the same heap covered with blanket, paper currency amounting to RM46,462.80, Thai Baht 100, RM (old currency) 140, US$12, Brunei $1 and S$26, together with a blue plastic basket (P19) which contained three (3) pairs of short pants (P19A to P19(C), one sarong and two batek sarongs (P19D to P19(F)) and some other items not relevant to the offence. PW2 further said he found a pair of lady's panties (P20) hanging at the window in room No. 3 and one blue sweater branded 'Sweat Studio' (P21). With the help of PW8, PW2 carried all the items seized downstairs and immediately prepared a search (P22). He then instructed L/Cpl. Lian Kia Hock, (PW9) who was at all material times guarding the items seized from the front basket of motorcycle PBN 237, to bring the said items into the said house to enable him to prepare another search list (P23).

After preparing P22 and P23, PW2, PW9, D/Cpl Lim Seng Kong, and the woman constable took the accused in their car to the Balik Pulau Police Station. The three other women who were also arrested in the house were taken by PW12 to the same police station, whereas P14 was ridden to the District Police Headquarters, Balik Pulau by D/Cpl. Abdullah Rahman on the instructions of PW2.

The exhibits seized from the front basket of P14 were replaced by PW2 in the front foot well of the car used by PW2 and the exhibits seized from Room 3 of the said house were entered into its boot. And all these exhibits were taken to the District Police Headquarters, Balik Pulau.

Upon arrival at 5 a.m. on 29 August 1989, PW2, with the assistance of PW8, took all the exhibits out of the said car to deliver them to CAD, Balik Pulau, with the accused in tow. It was here that the drug exhibits were immediately weighed and marked, by marking 'E' in respect of drugs' seized from the P14, and 'F', 'G' and 'H' for the three bundles seized from the said house. He then made two police reports namely Bayan Lepas report No. 2085/89 (P24) covering the seizure from P14 and No. 2086/89 (P25) for the seizure from the said house. Then, at about 11.10 a.m. on 29 August 1989 PW2 handed over to PW12 all said exhibits pertaining to the two said police reports, to PW12; both of whom signed the Handing-over Exhibits List dated 29 August 1989 (P26). The photographs of the house, its rooms taken by police photographer, Konst. Zulkifli bin Ahmad Dali (PW3) and were marked as P28(1) to (46). According to PW2, photo P28 (8) showed the bunch of 8 keys, hanging from the key inserted into the lock to door of room No. 3, which was successfully used to unlock same. He further said that P28(10) showed the latch to the common bathroom door as it appeared from the inside of room no. 3, which was found to be latched when the door to

room No. 3 was unlocked by him with the key from the said bunch of 8 keys.

Then, on 31 August 1989 at about 1.45 p.m., PW2, accompanied by PW12 took PW3 to the Jalan Sungai Ara scene of the earlier offence (involving P14) to take photographs (P27A to C) He further testified that P27J showed the ignition key to P14 attached to a road tax disc, the accused's wallet and a bunch of 8 keys; he (PW2) used a key from this bunch to open the door to room No. 3. Referring to P28, he said that P28 (31) to (34) showed the cupboard in room No. 9 on the ground floor of the said house, wherefrom he recovered the accused's international passport, her citizenship certificate and her Maybank book and RM741.

PW3 then took the stand and said that he took photo P27D on the night of 28 August 1989 and photos P27E to J at the office of PW12, On 29 August 1989 at 3.30 p.m., PW3 also took 6 photos (P29A to F) on the gold items seized from room No. 3 and three other photos. (P30A to C) of the RM30,000 cash, the pouch and the pillow from which, according to PW12, the RM30,000 was recovered.

After the evidence of PW3, an attempt had been made by the prosecution to adduce in evidence a cautioned statement (1D31) made by the accused at 11.00 a.m. on 3 September 1989, by calling Insp. Chua Thian Tiong (PW4) as the first witness in the trial within a trial ordered by this Court. The principle grounds of the defence objection to the admission of 1D31 being that it was made involuntarily and was based on the following:

(a) The accused was taken by a woman constable Azizah bte Omar and put into a small closed room alone with PW4, who was a heavily built man, while the woman constable waited outside. This was not disputed by the prosecution.

(b) Being an elderly woman, the accused was afraid when confronted by such a man, who appeared aggressive, asked questions in a loud voice and even thumbed the table hard when she refused to answer. This was disputed.

(c) At the time the accused was in the small room with Insp. Chua, she was unwell, as she had therebefore hardly slept or ate normally. She was given drinks which contained milk and hard bread, both of which she could not take - disputed.

(d) Every morning before the 3 September 1989 the accused was taken to Balik Pulau police station and returned in the evening to the lockup at District Police Headquarters, Penang - not disputed.

In deciding the issue of admissibility of a cautioned statement under s. 37A (1) of the Act, that is, whether a statement made by an accused person was obtained from him or her either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the essential points to consider are:

(1) The very wording of the caution required to be administered necessitates the presence of the all important element of voluntariness in the making of the cautioned statement by the accused. *PP v. Aris bin Yunus* [1989] 1 CLJ 239.

(2) The accused need only to raise - on the balance of probabilities - some doubt in the Judge's mind as to the voluntariness of the statement and the fulfillment of other requirements, in order to exclude the admission of the cautioned statement. *See PP v. Aris bin Yunus* [1989] CLJ 239.

(3) It is also axiomatic that before the Court even considers whether the statement is voluntary it should satisfy itself that the accused not only understood the language used in the caution but that he also understood the nature and consequences of the caution administered. A mere reading out of the caution and then asking whether the accused understood the caution is not enough. *See PP v. Mohd. Fuzi bin Wan Teh & Anor*. [1989] 2 CLJ 652; *PP v. Lim Ah Hai* [1992] 3 CLJ 1733.

(4) The onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary which in ordinary parlance means "of one's own free will". (See e.g. *Ibrahim v. The Emperor* [1914] 599 AC; *Wong Kam Ming v. The Queen* [1980] AC 247; *PP v. Chong Boo See* [1988] 1 CLJ 679.

(5) The question put to the accused should not be in the form of an interrogation. *PP v. Wong Kam Tong & yang lain* [1991] 2 MLJ 931.

(6) The expression "of one's own free will" would mean that the prosecution would have to show that the accused did not feel somewhat constrained to make the

statement and he was completely free from any form of restraint when giving the statement. *See Mohd. Fauzi's* case at page 654 E left and *Pendakwa Raya v. Chuah Chee Phe & Satu Yang Lain* [1991] 2 CLJ 924.

(7) The phrase "Any form of restraint" has recently been held to include psychological restraint or, in the words of Edgar Joseph Jr., SCJ, "psychological oppression", where his Lordship had held, in *Hasibullah bin Mohd Ghazali v. PP* [1993] 2 AMR 43, that, to quote: "In the instant appeal, the Judge failed to recognise that psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him and not sufficiently articulate to explain the circumstances and effect to the Court."

(8) The test to be applied as to whether the statement was voluntary is a subjective test, namely whether the court is satisfied from the facts and surrounding circumstances that the effect in the mind of the accused is that he has to make a statement whether he likes it or not. See *Mohd. Yusof bin Haji Ahmad v. PP* [1983] 2 MLJ 169 F. In other words, in deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point, is not so much the state of mind of the person in authority but that of the accused.

(9) It was also held in *Hasibullah's* case that the 'voluntariness' test has been expanded to include within its ambit statements which are rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. And though the provisions of proviso (a) to s. 37A(1) of the Dangerous Drugs Act which repeats s. 24 of the Evidence Act, do not provide for this as a ground for excluding a confession by an accused person, the high authority for this is the Federal Court case of *Dato' Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232, which appears to have incorporated the common law.

In *Dato' Mokhtar bin Hashim v. PP* the Court found that the trial judge was wrong in faling to exclude the statement made by the accused because it was the result of prolonged periods of questioning ranging into the small hours of the morning which "appeared to be suggestive of oppression." In so holding, the Court applied the definition of oppression propounded by Sach J in *R v. Pristley* [1965] 51 Cr App Rep 1 as, 'something which tends to sap and has sapped that free will which must exist before a confession is voluntary,' which was adopted in *R v. Prager* [1972] 1 WLR 260. And in *R v .Fulling* [1987] 2 All ER 65, a Court of Appeal decision, Lord Lane, CJ held that, to quote: ".... oppression must be given its ordinary dictionary meaning and applied the definition of that word as it appears in the **Oxford Dictionary** which says this:

'Exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens.' "

(10) The statement made should not be gleaned or extracted as the result of a material promise, proceeding from a person in authority, which relates to the charge envisaged or the surrounding physical circumstances the accused was then placed. See s. 37A (1)(a) of the Act.

It is plainly obvious that the above requirements and *onus* of proof expected of the prosecution are indeed very onerous and stringent. The reason being that the Courts have in the past often taken the sensible and common sense approach on the issue of the admissibility of cautioned statements when confronted with the stark truism; that it would run counter to the very grain of normal human conduct for a person, who, as enjoined by s. 37A(1), has to be sufficiently impressed by the caution to be administered, that he is not bound to answer any questions relating to the case, and that his statements (including statements amounting to a confession - as is so often the case) may be admissible or used in evidence at the trial, and who, indeed, would most probably also have been aware that the death sentence awaits the crime alleged against him, would nevertheless with true voluntariness confess away his life, so to say.

The Court has now to consider the application of the principles adumbrated above to the facts of the case before us.

The point raised by the defence was that the cautioned statement was obtained from the

accused as the result of threats and psychological oppression resulting from the oppressive circumstances she was then under, proceeding from a person in authority such as Insp. Chua Thian Tiong (BDB1).

Though this Court may accept the prosecution's explanation, via their second witness in the trial within a trial, to the effect that there was no woman police officer in authority then available to conduct the recording of 1D31, yet surely, applying the above principles, the test for voluntariness should be a subjective test. This would entail asking the following question: Considering the condition the accused was then in and the peculiar circumstances of her interview, whether the accused would have felt somewhat constrained or compelled to make the statement in 1D31?

In the event, I held that the manner of interview as expressed in (a) above, conducted by a male officer on a female accused, one to one so to say, in a small closed room, had caused the same sort of "psychological oppression" on the accused as envisaged in *Hasibullah bin Mohd Ghazali, (ibid)* and ruled that lD31 was inadmissible, as the prosecution had failed to establish beyond a reasonable doubt, its voluntary character.

Zakaria bin Ahmad (PW5), the officer in-charge-of vehicle ownership records in RIMV Penang confirmed that from his records (P32) one named Cheah Phaik Khim holding NRIC number 2171215 was the owner of motorcycle No. PBN 237 (P14) as on 28 August 1989 - the day of the offence.

Lee Teik Shen (PW6) produced a tenancy agreement dated 1 April 89 (P33) signed by him and the accused and the rental receipts (P34A to C) made out in favour of the accused, to show that the accused was the tenant of the said house number 12, Jalan Sungai Ara Dua, Sungai Ara, Pulau Pinang at the material period from 1 April 1989 until the day she was arrested. He also testified that it was the accused who paid the monthly rental of RM400 and the electricity and water bills. And after handing over all the keys of the said house to the accused, he did not keep with him any spare keys thereto.

The evidence of PPP Sulaiman bin Yusof (PW8), who was the leader of the operations, corroborated the evidence of PW2. in all material aspects of the latter's evidence on the recovery of the drugs from the basket of P14 and room No. 3 of the said house. Most importantly, he also testified that:

(a) After the accused was stopped at Jalan Sg. Nibong Kecil, Sg. Ara he saw the accused took out a bunch of keys from her right blousepocket.

(b) He entered the common bathroom (No. 7 in P18A) through Room No. 2, and tried but could not open the bathroom door to room No. 3 as it was latched from inside Room No. 3.

(c) He saw PW2 use one of the keys from the said bunch of 8 keys, taken from the accused's right pocket earlier, to try to open the door lock to room No. 3. PW2 did not succeed to open the door with 2nd key from the said bunch, at this point in time the accused appeared frighten.

It was then put to him by Counsel that the door to room No. 3 was forced open with a pair of scissors [appearing in P28 (23)], which he denied.

(d) He however admitted that the accused did not attempt to run away or to resist arrest at Jalan Sg. Nibong Kecil at 8.20 p.m. on 28 August 1989.

The prosecution then called Lee Lai Choon (PW10) who was one of the four sons of the accused. He admitted that he was involved in drug related activities one year before he was arrested and was currently in detention under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act. He further said that his other brothers Teoh Guat Kheng, Lee Lai Eng and Cheah Phaik Khim who was then the occupant of Room No. 1, were also involved in drug activities some time before he himself became involved. After Lee Lai Eng died, his wife Cheah Phaik Khim took over his activities. Teoh Guat Kheng was the son of the accused by her 1st husband (according to the I.O. he was also under detention in Muar, Johor for being involved in drug trafficking).

The Court also noted from the question put to PW10 by Counsel, that the other two deceased sons of the accused, Lee Lai Eng and Lee Lai Hin, were involved as well in drug trafficking, as, the question asked was whether PW10 was aware that drugs were recovered from the vehicle in which both his brothers died, in a road accident at Gopeng Road, Perak while on a drug

supply mission to Kuala Lumpur. The material points of PW10's evidence were that at the material times:

(a) He alone occupied Room No. 3, (though notably, he made no mention of having seen the offending items in room No. 3)
(b) Room No. 2 was occupied by persons who played majong or Gin Rummy and sometimes stayed overnight; and anyone else could stay there.
(c) The two photos on a dressing table in room No. 2 as shown in P28 (26) were that of his brothers Lee Lai Hin and Lee Lai Eng (both died in the road accident).
(d) The accused stayed at times downstairs in room No. 9 (in P18B) and at times in room No. 1 upstairs, with Cheah Phaik Khim (deceased).
(e) He was also arrested on the same day as the accused. (According to Lau Poh Choy (DW3), he was arrested outside the said house at 1.30 a.m. on 29 August 1989, i.e. the morning after the arrest of the accused).
(f) He was always in the said house.

Midstream through his evidence the learned DPP applied for the Court's leave to impeach his evidence, and should this be disallowed, then, for leave to cross-examine him as a hostile witness under s. 145 read together with s. 154 of the Evidence Act. The grounds being that certain vital portions of his evidence had contradicted the statement (1D37) he had earlier given under s. 112 of the Criminal Procedure Code. 1D37 was not shown to the Court or produced as an exhibit due to its prejudicial contents. Only the statements by the witness in 1D37 which (according to the learned DPP) contradicted his oral evidence herein, were specifically spelt out, and they are as follows:

(a) PW10 had testified that he stayed in Room No. 3 upstairs, whereas in 1D37 he had stated, to quote: "Emak saya tinggal di bilik sebelah saya".
(b) In his evidence he said, "Saya selalu ada di rumah tersebut" whereas in 1D37 he said, "Saya jarang ada di rumah".
(c) In Court he said that his mother stayed upstairs with Cheah Phaik Khim in room No. 1, but in 1D37 he stated "Saya tidur di sebelah bilik emak saya di tingkat atas".

The defence did not call PW10 or any other witnesses in the trial within a trial and did not deny that statements (a), (b) and (c) in 1D37 were in fact made by the witness, but left it to the Court to consider whether the contradictions, or rather (according to the learned counsel) apparent inconsistencies were serious enough to warrant impeachment.

After considering that the definition of "sebelah" in **Kamus Lengkap** (Edisi 1986) bears the English meaning of 'near or side' rather than adjoining or bordering, and that the other inconsistency as in (b) above did not strike at the root of the issue, the Court refused leave to impeach. However, after having observed the manner in which PW10 had given evidence in the examination-in-chief, the Court decided to allow the prosecution's alternative application for leave to cross-examine the witness as a hostile witness.

During cross-examination of this witness as a hostile witness, it was put to him by the learned DPP that he (PW10) told a pack of lies in Court to help the accused who was his mother, as he was then in fact staying in room No. 2 (adjoining room No. 3), and not in room No. 3 which was always locked, due to the presence of drugs and cash. It was further put that his mother had stayed in room No. 3 and he did not hold any keys to this room.

In cross-examination (by learned Counsel), PW10 said that his statement "di sebelah bilik" in 1D37, meant the room opposite room No. 1 (across the small upstairs hall - No. 4 in P18A). When he stated in 1D37 'saya jarang-jarang ada di rumah' he meant that he often went outstation but otherwise he would return at night to the said house to sleep. At this stage in his evidence he also said, "Walaupun emak saya duduk **merata-rata di bilik No. 1 tingkat atas** dan tingkat bawah, tetapi bilik tetap emak saya ialah bilik No. 9 di tingkat bawah". Whereas, in his examination-in-chief he was ambivalent, when he said "OKT tidor di **merata rata di tingkat bawah** termasuk bilik No. 9". He further said that he, Teoh Guat Kheng and his sister-in-law Cheah Phaik Khim held the keys to all the room doors of the top and ground floor rooms as well as the keys to the front door of the said house; and he used to see Cheah Phaik Khim enter room No. 3 during August 1989, kept drugs in the said room and often used motorcycle PBN 237 to convey drugs.

The evidence of PW12 (Insp. Adzmi bin Abdul Hamid), who was the investigating officer in

this case primarily corroborated the evidence of PW2 and PW8 in all material particulars. He further asserted that:

(a) He seized from room No. 3 a double-bed mattress, pillows a blanket and an electric fan. Upon examination of these exhibits later he found, hidden within one pillow an envelope containing RM30,000, and in another pillow he found 3 small bags, each of which contained gold items. He wrote out two search lists in respect of the gold items, namely a search list P45 in respect of the gold items together with RM78 and a search list P46 in respect of the RM30,000. In respect of these items, he lodged two police reports namely Balik Pulau polis report 1770/89 (P47) and report No. 1771/89 (P48). On 29 August 1989 he received a bunch of 8 keys and RM812.10, a road tax disc together with the ignition key for P14 and cash amounting to RM47,203.80.

(b) He produced the death certificate (P42) of Cheah Phaik Kim, who died on 2 April 1991 of a heart disease, and the death certificates of Lee Lai Eng (P43) and Lee Lai Hin (P44).

(c) On the night of 28 August 1989 he seized a bunch of four keys from Cheah Phaik Kim. And on 31 August 1989 at 2 p.m. he went back to the said house and used same to try to open the door-locks to each of the rooms in the said house. He found that certain keys from this said bunch of keys could only open the door to room No. 1, the front door grille but none of the keys could open the door locks to any of the other rooms in the said house.

(d) On the same day during that time, he tried and succeeded in opening the door-lock to room No. 3 of the said house with one of the 8 keys, which he then marked "A". He said that none of the 8 keys from the said bunch could open the door lock to room No. 1 or room No. 2; or any other rooms downstairs, except that one of the keys could open the front door of the said house. This key he marked "B". And another key with which he could open the front grille door he marked "C". According to him, other keys in the bunch of 8 keys could unlock the door to a cupboard located in room No. 9 and two cupboard-doors in the hall of the ground floor.

(e) On 9 September 1989 at 11.30 a.m. in his office with the assistance of woman constable Azizah, he tried fitting on the accused, the three short pants, two rain coats and a sweater (P16A and 8 and P19A to C and P21) and found that they all fitted the accused.

(f) On 10 September 1989, PW12 recorded a statement (ID50) from Cheah Phaik Khim under s. 112 (v) of the CPC. The learned DPP then applied for 1D50 to be admitted in evidence by virtue of s. 32(1) of the Evidence Act (which came into effect on 16 July 1993) read in conjunction with s. 112 (v) of the CPC. As 1D50 is clearly admissible under this provision the Court allowed the same to be admitted and marked as P50.

(g) He confirmed that Lee Lai Choon (PW10) and Teoh Guat Kheng were involved in drug trafficking activities and both of them were currently under detention.

The other material feature of PW12's evidence concerns the missing items, comprising the motorcycle key with road tax disc, the bunch of 8 keys seized from the accused at Jalan Sungei Nibong Kecil, Sg. Ara on 28 August 1989 at 8.20 p.m., the large quality of cash and some jewellery seized soon thereafter from the said house. He further testified that on 27 October 90 at about 10.00 a.m. at the office of Ketua Police Daerah he handed to TKJSJ Haji Khalid bin Hashim - in the presence of ASP Razali bin Mohd Nor (PW11) - for Haji Khalid's safe keeping, the sum of RM70,203.80, the aforesaid gold items as listed out in P45, the citizenship certificate of the accused, the account book No. 461090 of the accused, RM812.80, one road tax disc with the ignition key for P14, one bunch of 8 keys and one bunch of 4 keys. The cash, the gold items and the other aforesaid exhibits were missing as the result of the criminal actions of Haji Khalid bin Hashim, who was detained pursuant to Balik Pulau police report No. 2370/91 and charged on 8 April 1993 under s. 409 of the Penal Code on 4 counts. The relevant charge concerning the missing items in this case was adduced as exhibit P49C. According to PW12 it was as a result of the criminal misuse of the aforesaid cash, gold items and other items, that he was unable to produce same in Court as exhibits.

The Government chemist Tai Teik Siew (PW1) who examined all the aforesaid drug exhibits certified that:

(i) The drug exhibits in package 'A1' under police report No. 2085/89, namely P7C,

P7D, P8C and P8D contained 0.5 grams, 44.6 grams, 0.6 grams and 43.6 grams of heroin respectively totalling 89.3 grams of heroin (as per 1st Charge).

(ii) The drugs exhibits in package 'A2' under police report No. 2086/89, namely P9C, P9E, P9G, P9(I), P9K, P9M, P9(O), P9Q, P9S, P9U, P9W, P9Y, P9ZA, P9ZC, P9ZE, P9ZG, P9ZI, P9ZK, P9ZM, P9ZO, P9ZQ, P9ZS together contained a total nett weight of 690.6 grams of heroin; and exhibits in envelope 'A4' (under the same police report number) namely P13A to J together contained a nett weight 3,992.7 grams of heroin (the total nett weight of 690.6 grams and 3,992.9 grams of heroin from the basis for the 2nd Charge).

(iii) The drug exhibits in package 'A3' under police report No. 2086/89, namely P11A (1), PllA (xvii), PllB(i) to P11B(iv), P11C(i), P11D(i), P11E(i), P11F(i), P11G(i) and P11H(i) together contained a total nett weight of 262.5 grams of monoacetylmorphine (as per 3rd Charge); and

(iv) The drug exhibits contained in shopping bag bearing alphabets 'OG' and packed in package 'A4' (also under police report No. 2086/89) namely P13K, was found to be candu of 1,000.7 grams in weight (as per 4th Charge).

PW1 further confirmed that heroin, morphine, monoacetylmorphlne are listed in the 1st Schedule of the Dangerous Drugs Act 1952 and candu is prepared opium as defined in the Dangerous Drugs Act 1952.

After PW12 had given evidence the prosecution closed its case and offered 13 witnesses to the defence, including Insp. Lau Poh Choy, who was one of the two witnesses called by the defence.

Before deciding whether to call the accused to enter upon her defence, I carefully evaluated the evidence of the prosecution on the basis as enjoined in s. 180 of the CPC. This would entail posing the question: Whether the nature and strength of the prosecution evidence on the essential ingredients is such that if such evidence remain unrebutted at the end of the defence case (whether or not it choses to remain silent), the prosecution would have succeeded in proving its case beyond a reasonable doubt? The common expression used by our Courts for such evidence at the end of the prosecution case is *prima facie* evidence.

Midway during the course of the prosecution case I was alerted by the learned DPP about the Supreme Court's recent decision, of historical proportions, in *Khoo Hi Chiang v. PP* heard together with *Lee Shui Hooi @ Lee Cho Mak v. PP* [1994] 1 AMR 6 pg. 323).

The sole thrust of this well considered and thoroughly researched judgment seeks to impugn the Privy Council's *obiter dicta* expressed in *Haw Tua Tau* [1981] 2 MLJ 49). According to the ratio in *Khoo Hi Chiang (ibid)* Haw Tua Tau enjoins the Courts to undertake a minimal rather than maximum evaluation of the evidence tendered by the prosecution in deciding whether to enter upon his defence. The reason being that, in the relevant passages examined, Lord Diplock had in expressing his views, used words such as "unless it is inherently so incredible", "should keep an open mind about the veracity and accuracy of ..." and "jurors ... to suspend judgment until ...".

After having gone through a whole gamut of what he called, "a consistent current of judicial opinion in this country" pre Haw Tua Tau, on the *onus* imposed on the prosecution, Edgar Joseph Jr. SCJ, who spoke for the Supreme Court held as follows (at page 359):

> Consequently, the duty of the Court, at the close of the case for the prosecution, is to undertake, **not a minimal evaluation** of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible - the Haw Tua Tau test - **but a maximum evaluation** of such evidence, to determine whether or not the prosecution has established the charge beyond all reasonable doubt.

Solely with the view to obviating any doubt or difficulty that this passage may give rise to especially in the Lower Courts, perhaps it may not be amiss to restate what is plainly obvious from the passage (especially when considered in the light of the pre *Haw Tua Tau (ibid)*, Malaysian case authorities cited by his Lordship to back up the *ratio decidendi*) that the words "... to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt." in the said passage meant, "... to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt, **if rebutted**." [See *Soo Sing & 2 Ors. v. PP* [1951] 17 MLJ 143.]. In other words, the crux of this

recent decision calls for greater evaluation of the prosecution case, that is, in the qualitative rather than quantitative sense in terms of evidence led (e.g. in the event of contradiction or there being two conflicting sets of evidence led). I would fully agree and support such greater evaluation, as it makes no judicial sense for the Court to suspend evaluation of the prosecution evidence, and to move itself to act only when the evidence is "inherently so incredible", but otherwise to robotically go through the ritual of calling the accused to enter upon his defence.

Thus, the way I would interpret Khoo Hi Chiang is that the *obiter dicta* in *Haw Tua Tau* fell into error when it postulated a deferment or cursory and uncritical evaluation of the prosecution evidence until the defence evidence has been heard. This former position would justify a further evaluation of the probative value and strength of the prosecution case before deciding whether to convict, should the defence remain silent and calls no witnesses. However, the decision in Khoo Hi Chiang calls for "maximum evaluation" of the prosecution case by asking the hypothetical question: Whether, should the defence remain silent (that is, if "unrebutted" as under s. 180 of the CPC) the strength and probative value of the prosecution case is such that the charge would be proved beyond reasonable doubt. This new position would justify automatic conviction of the accused should he remain silent.

This recent decision of the Supreme Court on what constitutes *prima facie* evidence, has brought about in its wake, the following legal ramifications and change:

(A) After being satisfied upon such maximum evaluation, that a *prima facie* case had been established - and calling the accused to enter upon his defence - the Court must necessarily convict the accused should he choose to remain silent and call no evidence.

This reaffirmation of pre Haw Tua Tau law, lends a touch of prescience to the words of Azmi Kamaruddin SCJ when he expressed the following in *Munusamy v. PP* [1987] 1 MLJ 492, which I here take the liberty to quote:

> It must necessarily follow that if the accused elected to remain silent and called no evidence the Court must convict him since the hypothetical position obtained pursuant to s. 180 that the prosecution evidence would not and could not be rebutted, has become a reality (see *Public Prosecutor v. Man bin Abas* [1935] 1 MC 160.
> (Emphasis added)

(B) Both the respective passages, namely, one occurring ln the decision of Edgar Joseph Jr. J. (as he then was) in *Pavone v. PP* [1984] 1 MLJ 77 and the other, expressed by this Court in *Kumaraguru a/l N. Muniandy & 2 Ors. v. Public Prosecutor* [1993] 2 AMR 50, are no longer valid law. In *Pavone v. PP*, this is how his Lordship put it:

> Consequently, in a proper case, there is nothing illegal in a Magistrate or a President or a Judge sitting alone with Assessors, calling for the defence upon *prima facie* evidence being adduced **and then proceeding to acquit** and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.
> (Emphasis added).

And in *Kumaraguru's* case, this Court, which faithfully followed *Pavone v. PP (ibid)* had this to say:

> The close of the prosecution case and the close of the defence case necessarily involve two very different stages of the trial and, upon the principles enunciated in *Haw Tua Tau (supra)* - approved and applied ln the Federal Court decision of *Ragunathan v. Public Prosecutor* [1982] 1 MLJ 139 - also necessarily involve two different standards of proof, neither of which could be similar or dispensed with if the court has to suspend judgment at the close of the prosecution stage. It is highly essential that this dichotomy in the two entirely distinct stages, which in turn necessitates two vitally different standards of proof should be consciously maintained by the Court at both the stages. Logically, the rationale employed in deciding to call the accused to enter upon his defence, which is based on asking certain hypothetical questions, could not be the same rationale for the conviction of the accused, in our system of justice which permits one and only one standard of proof for a conviction; and that is that each and every essential element of the offence has to be proved beyond reasonable doubt.

(C) The words "... you may remain silent" in the three alternatives that all Courts are enjoined to administer to the accused after having called him to enter upon his defence, has now become dead letter; and even if hereafter it has to be

ritually administered, the words must be followed by the following words of caution: "... but should you do so, this Court would have no alternative but to find you guilty as charged/amended charge." Indeed, failure to do so may well constitute a valid ground for an appeal, especially in the case of an unrepresented accused - *a fortiori* if one has to take into account the Magistrate's duty to explain to an undefended accused under s. 257(i) of the CPC. Furthermore, contrary to the provision in s. 257(ii), an unrepresented accused who remain silent and calls no witness when defence is called, could not only "be made the subject of adverse criticism by the prosecution" but indeed, the prosecution is entitled to call for a verdict of guilty as charged (or on an amended charge if so called by the Court).

(D) As it is now required of the Court to conduct a maximum evaluation of the evidence at the end of the prosecution case (and not keep an open mind or suspend judgment until close of defence case) on a beyond-reasonable-doubt-if-unrebutted basis, it would be quite insufficient for the Court merely to hold itself fully satisfied that a *prima facie* case has been made out; but, in the interest of justice, it ought to go further to state its reasons and rationale for holding that the prosecution has established its case beyond reasonable doubt which if unrebutted, would warrant a conviction. Namely, the decider would have to demonstrate in his judgment, a conscious intellectual activity in critically evaluating the prosecution evidence upon the much heavier test.

Perhaps, in the appeal hereto, the Supreme Court's views in this regard could afford invaluable guidance to the Courts, because, in my opinion, the greatest impact of *Khoo Hi Chiang* is probably wrought on this aspect of future Court judgments.

It was perhaps when faced with the above problems, the issue of negation of the accused's right to remain silent, and the rhetorical questions posed in my decision in *Kumaraguru's* case *(ibid)* that the then existing concept of what constituted *prima facie* evidence (yet to be specifically defined and which at any rate, is not a concept capable of easy specific definition) was conceived, though expounded by Lord Diplock in *Haw Tua Tau (ibid)* in somewhat less than felicitous language.

This case affords a suitable opportunity for this Court to consider the prosecution case in the light of Khoo Hi Chiang. In deciding whether sufficient *prima facie* evidence has been established by the prosecution, this Court would necessarily, even at this stage, have to also evaluate the evidence of PW10 (Lee Lai Choon). There being no serious challenge by the defence as to the identity or manner of analysis of any of the drug exhibits produced in this trial.

I recognise that it was the prosecution who, in their exclusive discretion decided to call Lee Lai Choon (PW10), the son of the accused and whose evidence, if accepted by the Court as truthful, would have resulted in there being two materially conflicting sets of prosecution evidence; in which event the more favourable version of such crucial evidence ought to go to the benefit of the accused. See this Court's decision in *Lee Eng Kooi v. PP* [1993] 2 CLJ 534.

PW10 appeared in Court to be a witness who gave evidence in a hesitant and evasive manner, especially as regards the room in which the accused occupied, and his knowledge of the drugs found in room No. 3 which he claimed to have been occupying at the material time of the offence.

The whole of his evidence was marked by prevarication. Notably, he had said that the accused stayed in room No. 1 upstairs and in every room downstairs including room No. 9. His statements in the examination-in-chief and cross-examination showed that he was far from being categorical as to whether the accused's fixed abode was room No. 9. He admitted having said in ID 37 that he was seldom in the said house, yet before this Court he testified that he was always in the said house. As such, although PW10 is a competent witness for the defence, yet the very manner in which he gave evidence and the inconsistent nature of his evidence has made him a completely unreliable witness, devoid of any credibility for the purpose of this trial; save perhaps only to effect confirmation that he and his brothers were involved in drug activities at the material time.

Bearing in mind that the *onus* throughout rests on the prosecution to prove its case and every ingredient of the charge rather than on the accused to prove his innocence, the Court at this stage, and, *a fortiori*, in view of the decision in *Khoo Hi Chiang (ibid)* - even when

there is no challenge or serious challenge by the defence on such issues - ought to deliberate and make a finding on the question of, firstly, the identity of the drug exhibits produced in Court and, secondly, the method and results of the drug analysis by the Government chemist.

After carefully examining the evidence of PW1 I am fully satisfied that the drug exhibits were properly kept and examined by him and I accept his report of the result of his chemical examination of the offending substance.

I also find that the chain of evidence on the handling of the drug exhibits from the time of seizure until production in Court was not at any stage broken. Though the exhibits were marked and initialled by PW2 only after he had arrived at the Cawangan Anti-Dadah, Balik Pulau, L/Cp1. Lian Kia Hock (PW9) had guarded the exhibits (seized from P14) during the search in the said house and D/Cpl. Abdullah bin Rahman had guarded the top floor of the said house (where room No. 3 was then locked) when PW2 and other police personnel proceeded downstairs to conduct their search. Thereafter, until the marking and handing over of same to PW12, the exhibits were at all times in the physical custody and care of PW2. Furthermore, to ensure that there was no mix-up, the exhibits recovered from the said house were separately placed in the front footwell and the boot respectively of the car used by PW2.

In the event, as the prosecution's main witnesses had not been broken in cross-examination on the pointed evidence which told against the accused, and the Court being also satisfied (at this stage) that:

(i) the bunch of 8 keys were seized from the accused's right blouse pocket, and from this bunch one of the keys was used by PW2 to open the door to room No. 3, (wherein all the offending drug exhibits under Police No. 2086/89 were found) and the accused would thus have exclusive control, care and management of room No. 3;

(ii) substantial amount of cash and jewellery were found in room number 3 and for this reason, the prosecution's assertion that the door to room No. 3 and that its bathroom door common to room No. 2 was locked at the time of the raid of the said house, are both highly probable and credible;

(iii) the accused was stopped while riding P14 and carrying the drugs items (as stated under Police Report No. 2085/89) in the front basket of P14;

(iv) the vital missing exhibits were indeed recovered as alleged but became missing as a result the criminal actions of the Superintendent of Police, Haji Khalid bin Hashim, of which my reasons would follow in the course of this judgment;

(v) the evidence of PW10 is wholly without any merit;

the Court held that the prosecution had succeeded in establishing sufficient and strong circumstantial evidence on exclusive possession, custody, control and knowledge of the offending items against the accused, and also the presumption under s. 37(da) of the Act, in respect of all the four charges which, if unrebutted would warrant a conviction; and called the defendant to enter upon her defence.

Upon the defence being called the accused elected to give evidence on oath and called two witnesses.

The accused testified that she ran a mahjong centre as a means of livelihood at the said house. She had four sons including PW10 and two daughters. She had a grandson named Lee Chee Hye, aged 3 months who was the male issue of her son Lee Lai Eng (deceased) and her daughter-in-law Cheah Phaik Khim. She said many people often called at her house to play jin rummy, mahjong, and also poker at weekends. There would be 50 to 60 people at her house every night - some of them only as spectators. On the night in question she was riding P14 on the way to Sg. Dua to seek advice from a temple medium because her grandson Lee Chee Hye was sick and crying. P14 which belonged to Cheah Phaik Khim was then parked outside the said house when she borrowed same (without the permission of Cheah Phaik Khim). She took out the motorcycle key from a drawer at a family alter located at a hall downstairs, from which all members of the family used to keep and take out small items such as keys and the like. At the time she borrowed the motorcycle (P14) she was totally unware that it was carrying any drugs. Most importantly she said, she had stayed in room No. 9 downstairs and seldom went upstairs of the said house; and that she did so only when she hears her grandson crying. She said that Cheah Phaik Khim, the latter's mother

Yeoh Ah Sim, and 2 small children, namely the three-month old grandson and a grand-daughter named Ooi Soo Eng aged 7 years old stayed in room No. 1. Cheah Phaik Khim was in-charge-of the cleaning of all the 3 rooms upstairs. Whereas she (the accused) hired a casual worker to clean the ground floor of the said house four times a week. Cheah Phaik Khim held the keys to every room upstairs. Cheah Phaik Khim was only 17 years old at the time of her arrest.

The accused said she did not know the drugs found in room no.3 belonged to whom, but she said that her son Lee Lai Choon PW10) stayed in room No. 3. She denied that when she was stopped at 8.30 p.m. on 28 August 1989 she took out the bunch of keys from her pocket. She could only identify the bunch of keys in photo P27J and that bunch of eight or nine keys were strung together with the ignition key of the motorcycle. The accused further testified that she had neither entered room No. 3 nor held any keys to room No. 3.

In cross-examination, she said that she loved her daughter-in-law Cheah Phaik Khim because she was a good, hard-working and trustworthy person. There were only four mahjong tables in the said house and only four persons could play mahjong on each table at any one time. And that she did not carry along any joss-paper or joss-sticks in the motorcycle on the way to the temple as she could purchase same at that place. She had seen the gold items but they were kept by Cheah Phaik Khim. She further said that she did not notice the drug exhibits when she rode on P14 to go to temple as she took out the motorcycle hurriedly.

The very brief testimony of the brother of the accused, Goh Say Seong (DW2) only sought to corroborate the accused's story that she ran a gambling house at the said house, and she also looked after her grandson.

The last defence witness, Insp. Lau Poh Choy (DW3) said that he arrested PW10 in front of the said house at around 1.30 a.m. on 29 August 1989 (i.e. the morning after the arrest of the accused). Thereafter, PW10 led him to his room at the top floor of the said house, and a search was carried out but nothing incriminating was found. Of note here is that at that point in time, the offending items and the accused had already been removed following the earlier raid. However, the material question as to which room DW3 was shown that morning, was neither asked nor put by Counsel or the learned DPP. Bearing in mind that room No. 2 upstairs (wherein the two photos of the accused's two deceased sons were found) were then, according to PW10, unoccupied (probably, after her two brother's death) save for overnight gamblers, this room No. 2 may very well have been occupied by PW2 at that time. But, regretably, this Court was left only to speculate.

After the evidence of DW3 the defence closed its case.

Clearly, the issues for judicial determination, in order to arrive at a fair conclusion as to whether the accused had raised a reasonable doubt to rebut the strong circumstantial evidence already established by the prosecution, and the presumption under s. 37 (da) of the Act in respect of the four charges levelled against the accused, are as follows:

(a) Whether the non-production of certain vital items seized, as Court exhibits would be fatal to the prosecution case;

(b) Who was the occupant of room No. 3 at the material time, bearing in mind that it was never in dispute that the offending items - as itemised by the prosecution witnesses - were recovered from room No. 3, as, if the accused was the exclusive occupant, she would have custody and control and knowledge of the said offending items;

(c) Whether the evidence of PW2 and PW12 that they succeeded in opening the door to room No. 3 by using one of the keys from the bunch of 8 keys, could be believed, and whether this bunch of keys were in fact seized from the accused's right pocket, as alleged;

(d) What weight ought to be attached to P50 i.e. the statement of Cheah Phaik Khim, especially when considered in conjunction with the evidence of PW10;

(e) Whether the drugs seized from P14 belonged to the accused and she had knowledge, custody and control of same;

(f) The credibility of the prosecution witnesses, which essentially was the central issue, as the identity and analysis of the drug items were not seriously or successfully challenged by the defence.

As regards (a) above, this Court is mindful that missing incriminating items, even vital ones do not necessarily vitiate the prosecution's case,

provided that the Court is fully satisfied, after careful consideration of the evidence, that they did at the material and crucial time exist. *See Chong Ah Chai and Ors. v. PP* [1979] 2 MLJ 262. In this respect P22, P23, P24, P25, P26, P47 and P48 clearly corroborated the prosecution's contention that the cash, the gold items and the bunch of 8 keys together with the motorcycle key attached to a road tax disc were recovered in the manner alleged, and did exist; indeed the relevant photograph - exhibits P27 I and J, P28 (8), (22) to (25), (43) to (45), P29A to F and P30A to C have further afforded ample documentation to lend positive confirmation that the missing items were in fact, and in the alleged manner, recovered. Thus, the Court accepts the prosecution's submission that such items would have been produced as evidence had it not been for the criminal deeds of Haji Khalid bin Hashim considering that the relevant charge against the latter was also adduced in evidence. (See P49C).

In regard to (b) above, after having also, considered (c) below, the Court is fully satisfied beyond doubt that the accused and not PW10 was the sole and exclusive occupant of room No. 3; although apparently she may have kept some of her personal belongings in room No. 9 downstairs. There is ample proof that the accused was the tenant of the said house and there is also no doubt in my mind that she had exclusive control and management of room No. 3 as the key to this room was recovered from her blouse pocket and no one else had the key. She thereby had the sole and exclusive custody, control and knowledge of all the offending exhibits that were recovered from that room.

In her evidence, she was silent as to how the door lock to room No. 3 was opened by the raiding officers. Counsel had put to PW2 that it was opened with a pair of scissors - notably, a highly improbable instrument to use to open doors, but yet an implicit admission that the door to room no.3 was then locked.

As regards issue (c) above, again after careful consideration of the evidence of PW2 which was strongly corroborated by the evidence of PW12 and PW8 - in conjunction with the said photographs of the items seized and P38A, P23, P26, the Court is completely satisfied that the bunch of 8 keys were recovered from the accused's right pocket and one of the keys from this bunch was used to open room No. 3. The Court is also satisfied that the room door and the toilet door in respect to room No. 3 was, at the time of the raid, locked when the offending items were recovered therefrom.

As regards issue (d) above, the statement of Cheah Phaik Khim (P50) contained the following. After she had stayed at No. 7 Lorong Hijau Pulau Pinang for 2 or 3 months she was requested by the accused to shift to the said house, where she was instructed by her to stay in a room upstairs across the hall and was given a bunch of 4 keys. One of the keys was for her said room one for the front door, another for the front door grille of the said house and the fourth key was for a mahjong table drawer. She said she could only enter her said room but there was another room on the same floor which was always locked and which she could not enter. Yet another room upstairs belonged to Lee Lai Choon (PW10) which she used to enter to take magazines therefrom; and her sewing machine was kept there as well. According to her, the third room upstairs was the accused's room which was always locked; she did not know why this room was always locked. The accused did not give anyone the keys to her room and kept i it in her pocket; and she had not seen anyone else besides the accused enter the accused's room.

The accused, she said, had two rooms: one room upstairs and another one room downstairs which she used only to keep her clothes and for playing mahjong and jin rummy; whereas the accused slept upstairs in the said room which was always locked. She said there was a telephone in the accused's room and another one beside the TV set at the hall upstairs. Most importantly, she also said that Lee Lai Choon's room was the room adjoining the accused's room. At the time of the raid of the said house on 28 August 1989 she saw a police officer use a key to open the door to the accused's room after trying all the other keys that the officer had with him. When the police officer entered the room they said in Hokkien and Bahasa Malaysia 'Oh, banyak barang'. She further said that she did not know the accused was involved in drug trafficking. And that she often left her key to P14 in a drawer at a family alter, and she did not know who had used her motorcycle on the night in question. The raincoats (P16A and PB) were not hers and only the accused used them, she said. The accused had often used P14 if same was not used by her; and she never asked the accused where she went.

In considering the statement (Exhibit P50) of Cheah Phaik Khim (deceased), I have reminded myself that unless there are strong grounds for accepting the statement of the deceased the Court should reject same, as Counsel has been deprived of a most potent and valuable advantage in not being able to cross-examine the maker of such statement. Also, in my view, it is essential to constantly maintain the dichotomy in considering the 1st charge on the one hand and the rest of the 3 charges on the other.

Issue (e) is also interwoven with issue (c). Cheah Phaik Khim had said in P50 that her motorcycle key was habitually kept in a drawer at a family alter in the hall downstairs - which, incidentally, has the unwitting and undesigned effect of lending weightier credence to her other statements in P50, when one considers that the accused had also said that she had taken the ignition key to P14 from the said family alter. This particular statement confirmed that the said key to P14 was accessible to the other occupants of the said house. Considering that the drugs in the basket of P14 was hidden at the material time of the arrest, on this score alone, the accused may be entitled to the benefit of the doubt on the 1st charge, if not for the other incriminating pieces of evidence against her which this Court would have to deliberate upon.

The fact that much of what the deceased had stated in P50 had corroborated the evidence of the prosecution's main witnesses, the photo exhibits and the accused's own story cannot be overlooked, and the Court is impelled to accept and to give some weight at least to the material portions of the statements in P50. Indeed, when the accused was shown photo P27J she identified the bunch of keys shown in P27J (eight or nine keys she said) but said that that bunch was hanging together with the motorcycle ignition key. By this assertion the accused had intended to suggest that the bunch of keys were the ones earlier taken from the family alter at the hall and they belonged to Cheah Phaik Khim. To interpose, in the Court's view, it is highly unusual for an owner of a motorcycle which is accessible to others, to attach other vital keys to his motorcycle ignition key. Whereas, it is obvious that the single key attached to the road tax disc (also appearing in P27J) rather than the bunch of keys, could indeed have been and - the Court is convinced - was the motorcycle key that the accused had taken from the family.

Another factor is that though the ignition key to P14 was accessible to all occupants of the said house, yet according to evidence led by both the prosecution and defence, only the accused and Cheah Phaik Khim had the use of P14 during the period concerned. This being so, the offending items found in the basket of P14 must necessarily belong to either the accused or to Cheah Phaik Khim. I find, after due consideration, that these offending items in P14 could not have and did not belong to Cheah Phaik Khim, but rather, to the accused.

Concerning (f) above, the credibility of the prosecution witnesses were not only not dented but were sufficient to completely convince the Court that even if P50 is totally excluded and treated as a piece of scrap paper, there are enough other cogent evidence led by the prosecution for the Court to find the accused guilty on the four counts as charged.

The Court also finds that the prosecution has for the reasons aforesaid succeeded - by the absolutely overwhelming nature of evidence led - in building up a formidable case of exclusive possession, custody, control and knowledge of the offending items against the accused in at least the 2nd, 3rd and 4th amended charges. Such Prosecution evidence when considered in conjunction with the sham defence of the accused, impelled the Court towards deciding, at the end of the defence case, that the defence has not succeeded in raising a reasonable doubt against guilt in respect of any of the three amended charges. Also, in respect of the first charge as well and for reasons adumbrated above, the defence has failed to raise a reasonable doubt in the Court's mind that the accused had exclusive possession, custody and control and knowledge of the drugs recovered from P14. I further find that the presumption under s. 37(da) of the Act against the accused raised upon the established facts against her in respect of all the four (4) charges has not been rebutted on the balance of probability, and neither did she sought to rebut same in her defence.

This was a lengthy tedious trial, involving two trials within the trial (on the issue of impeachment and admissibility); this Court being at the outset also keenly aware that its essential duty was to consider whether the accused was a culpable "mother-hen" (so to say) who ran a den of drug-pushing children, or an innocent victim of mere circumstantial evidence consequential upon her having drug pushing children - and

should there be any doubt, such doubt ought go to favour of the accused.

The accused's defence was that of a bare and barefaced denial; the sum total of her evidence being a tenuous and feeble attempt to shift blame for the offence to her son PW10 directly, and to Cheah Phaik Khim, by implications and suggestions. The latter was alleged to have held the keys to all the rooms upstairs; and PW10 was alleged to have been the sole occupier of room no.3. Yet significantly, the accused fell short of saying that the drugs belonged to either of the two of them.

Even without the accused's cautioned statement, which was rejected by this Court as not being made voluntarily, this Court is nevertheless satisfied beyond doubt that this woman had run a den of drug trafficking sons not unlike the character of Mr. Figgins with his den of pick-pockets - in "Oliver" - only in this case, it concerned not the picking of pockets, but activity much more nefarious and destructive to society. For this, the law has now exacted the ultimate penalty of death.

The outcome of this case, yet again served as a tangible demonstration of this Court's belief that, with tenacious, sagacious but wholly fair and professional prosecution, a prosecutor would hardly need to make a call on the assistance of a caution statement to secure a conviction, where probative facts warrant such verdict.

The accused was not only an author of her own misfortune but probably got all her sons involved as well; she became a grandmother and with equal distinction, caused her whole family to be wiped out in the process, considering that two of her sons died in a road accident while conveying drugs to Kuala Lumpur and the other two are now in detention on drug related offences. Indeed, any sympathy from this Court for the accused for being a grandmother, would grossly be misplaced, and against the weight of damning evidence against her. In the interest of the public this Court is duty bound to demonstrate in no uncertain terms, that the law as it falls, for or against an accused, whoever they may be, shall be imposed regardless.

For all the above reasons adumbrated I find the accused guilty as charged in respect of all the four amended charges and pass the mandatory death sentence on her in respect of each of the four said amended charges.

PUBLIC PROSECUTOR

v.

KARIM BIN OTHMAN

HIGH COURT, KUANTAN
DATO' HJ. LAMIN BIN HJ.
MOHD YUNUS J.
[CRIMINAL TRIAL NO 47-1 of 1990]
20 OCTOBER 1993

CRIMINAL PROCEDURE: Witnesses - Section 425 Criminal Procedure Code - Application to call a witness already offered to the defence - Whether evidence of witness essential to the just decision of the case - Whether examination thereof tantamount to the prosecution "reopening" its case - Principles to be applied.

CRIMINAL PROCEDURE: Discretion of Court to recall witnesses - Section 425 CPC - Circumstances for exercise of discretion - Whether discretion exercisable at any stage of proceeding.

EVIDENCE: Information leading to discovery of facts - Section 27 Evidence Act 1950 - Admissibility - Whether information given led to discovery - Whether police had prior knowledge of existence and whereabout of cannabis.

EVIDENCE: Statement from the dock - Bare denial - Whether trial Judge dutybound to convict - Evidence of accused silent on incriminating evidence of two plastic bags containing cannabis found on his person - Whether fatal.

WORDS AND PHRASES: "essential to the just decision of the case" - Section 425 Criminal Procedure Code.

The accused in this case was charged with two offences under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) for trafficking in cannabis for which has defence had been called in respect on both charges. The evidence showed that the police party, soon after arresting the accused and seizing two plastic bags containing cannabis from his person, started to interrogate the accused in which a question was put to the accused thus " Ada lagi tak baki ganja yang awak simpan" to which the accused replied " Saya ada simpan baki ganja dalam seluar di tepi dinding dan bawah kayu di tepi pondok". As a result of this information cannabis were discovered by the police from a pair of trousers hanging on the outside wall of a hut situated some 15 metres from the place of interrogation. And likewise, from beneath a heap of wood under the said hut, more cannabis were discovered by the police.